SUPREME COURT, U.S.
Supreme Court, U.S.
OCT 10 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-295

FUR INFORMATION AND FASHION COUNCIL, INC., ASSOCIATED FUR MANUFACTURERS, INC., UNITED FUR MANUFACTURERS ASSOCIATION, INC., FUR WHOLESALERS ASSOCIATION OF AMERICA, INC., MASTER FURRIERS GUILD OF AMERICA, INC., FURRIERS JOINT COUNCIL, OLIVER GINTEL, INC., J. PALANKER & SONS and FREEDMAN-LEVY, INC.,

Petitioners,

v.

E. F. TIMME & SON, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

Question No. 1 set forth on page 2 of the petition fails to disclose that the interpretation of Section 43(a) of the Lanham Act (15 U.S.C. Section 1125(a)) ascribed to the United States Court of Appeals for the Second Circuit was solely by way of dictum and that review of that interpretation by this Court would require a factual determination

that the Second Circuit committed clear error in unanimously holding that respondent's challenged advertisements contain no misrepresentations, either as to an inherent quality or characteristic of respondent's goods or otherwise.

Question No. 1, as stated, is further defective in that it erroneously asserts decisions of other Circuit Courts to have been contradictory to the Second Circuit's aforesaid interpretation.

Question No. 2 inaccurately describes the interpretation of the Court of Appeals below as a holding.

Question No. 3 is not presented on this record.

Question No. 4 incorrectly characterizes the decision of the Court of Appeals and pertains to a factual issue of importance only to the litigants herein.

Constitutional Provisions, Statutes and Rules Involved

Petitioners' quotation of Section 43(a) of the Lanham Act (15 U.S.C. Section 1125(a)) omits the title of that Section which is part of that enactment and may have a bearing on its interpretation.

The title reads:

> "VIII—False Designation of Origin and False Descriptions Forbidden."

Statement

Petitioners' statement of the case on page 4 of the petition characterizes respondent's two television commercials sought to be enjoined by petitioners in the courts below as violative of Section 43(a) of the Lanham Act (15 U.S.C. Section 1125(a)) as containing "false implications that the

buying of respondent's products would save tigers and leopards from being killed for use of their fur for garments and that petitioners and all those similarly situated are responsible for the illegal killing of said animals for commercial purposes".

The Second Circuit, after viewing the advertisements, unanimously held to the contrary, stating with respect to the District Court's finding that such false implications had been made:

> "We are convinced that these ads carry no implications, false or otherwise, that plaintiffs, including their union employees, go about the country illegally killing tigers and leopards for commercial purposes. In fact, the court is prepared to take judicial notice that the numbers of tigers and leopards in this country is limited to zoological gardens and itinerant circuses. Equally unrealistic is the thought that a potential purchaser of one of the defendant's imitation leopard coats makes the purchase with the thought that she (probably) is saving a leopard from being killed. To the contrary she knows that no real leopards are available—hence, if her desires compel her to appear in spots, she must resort to such imitation as is available. Furthermore, a cloth imitation of any fur is far less expensive and many purchasers for this reason are willing to compromise for less than the 'real thing'.
>
> The ads seem to this court to do no more than to tout, in a rather pointed fashion, the advantages of imitation over natural furs: The imitation furs resemble the real thing, are less expensive, and can be purchased without necessitating the death of a live animal. These representations are either true or acceptable puffing." (Petition, pp. 6-A, 7-A)

If the Second Circuit was correct in this factual determination, no question whatsoever of the interpretation of Section 43(a) is presented on this record.

The correctness of this interpretation is, we submit, plainly evident from the District Court's description of the advertisements as follows:

> "The Court viewed these two Ads. They are produced in color. The fact that 40% of the New York market continues to view television in black and white was the significant motivation for the choice of leopard (with contrasting spots) and tiger (with stripes) over a monochromatic fur.
>
> The Leopard Ad, sixty seconds in length, begins with color scenes of animals in their natural habitat, including hippopotami swimming, antelopes running in a pack and a leopard with her cub.
>
> The leopard is then viewed through what are apparently the sights of a large firearm. The scene fades. A gunshot is heard. The scene shifts to a cocktail party ostensibly in the United States. A fashionably dressed woman admires the leopard coat of another. The voice of an unseen male speaks:
>
> Man's Voice: There are too many women who want leopard coats in the world and too few leopards. Timme makes fake furs every bit as beautiful as the originals. We think people should wear our fake fur and leave the leopards' coats where they belong, on leopards.
>
> Woman: Buy me one before the jungle runs out of them.
>
> Man's Voice: Timme. Makers of Timmetation Fake Furs, and fabrics for just about everything else.
>
> This is followed by a picture of examples of various other Timme fabrics used for upholstery and apparel.
>
> The Tiger Ad, thirty seconds long, is to the same effect. A lovely girl appears in color next to a friendly and affectionate tiger. She says:
>
> He [the tiger] is wearing a real tiger coat. I'm wearing a fake fur by Timme. Although it's vir-

> tually impossible to tell the difference, a Timme fur costs far less money. Perhaps even more important, it didn't cost a tiger his life. The beauty of a Timme fake is that you can wear a beautiful coat and he [the tiger] can keep his.
>
> This is followed by the voice of an unseen male, naming Timme as a maker of fake furs and fabrics." (Petition, pp. 14-A—16-A)

The Petition Should Be Denied

The issue whether these advertisements contain any misrepresentations is a narrow, factual issue of limited importance involving no question of federal law and presents no special or important reason to warrant this Court's review.

Moreover, assuming *arguendo* that the advertisements do contain the misrepresentations alleged by petitioners and found to exist by the District Court, the interpretation of Section 43(a) upheld by both courts below, is not at variance with the interpretation given that section by other Circuit Courts.

Argument

In setting up the asserted conflict the petitioners array the interpretation of Section 43(a) of the Lanham Act expressed by the District Court and the Court of Appeals in the case at bar against the so-called "broad construction" (Petition at p. 19) said to be found in *L'Aiglon Apparel* v. *Lana Lobell, Inc.*, 214 F.2d 649 (3d Cir. 1954) and *Norman M. Morris Corp.* v. *Weinstein*, 466 F.2d 137 (5th Cir. 1972). Reliance is also placed upon *Chanel, Inc.* v. *Smith*, 178 U.S.P.Q. 630 (N.D. Cal. 1973) on remand from *Smith* v. *Chanel, Inc.*, 402 F.2d 562 (9th Cir. 1948). An analysis and comparison of the decisions relied upon by the petitioners reveals a harmony of construction rather than a divergency necessary for this Court to resolve.

In *L'Aiglon v. Lana Lobell, Inc., supra,* defendant was alleged to have used photographs of plaintiff's $17.95 dress in the literature advertising its $6.95 dress. It is clear that the representation arising from the use of the photograph of the more expensive dress falsely described or misrepresented the dress defendant was actually selling.

The reference to Section 761 of The Restatement of Torts as bearing "closest resemblance" to Section 43(a), *L'Aiglon v. Lana Lobell, Inc., supra,* 214 F.2d at 651, reinforces the conclusion that the Third Circuit was concerned with a misrepresentation that related to a quality of the goods defendant was selling. Section 761 provides that liability arises on the part of:

> "One who diverts trade from a competitor by fraudulently representing that the goods which he markets have ingredients or qualities which in fact they do not have but which the goods of the competitor do have, is liable to the competitor for the harm so caused, if,
>
> (a) when making the representation he intends that it should, or knows or should know that it is likely to, divert trade from the competitor. . . ."

Moreover, *L'Aiglon* v. *Lana Lobell, Inc., supra,* was decided fifteen years prior to *Bernard Food Industries, Inc. v. Dietene Co.,* 415 F.2d 1279 (7th Cir. 1969), *cert. den.* 397 U.S. 912 (1970), one of the decisions relied upon by the Second Circuit in the case at bar as support for the proposition that Section 43(a) "was intended to apply only to misrepresentations relating to the inherent qualities of defendant's own goods", Petition, p. 8-A.

Significantly, in *Bernard Foods Industries, Inc.* v. *Dietene Co., supra,* this Court was petitioned and refused to grant a writ of certiorari. Any conflict of opinion arising from the proposition for which *Bernard Foods Industries, Inc.* v. *Dietene Co., supra,* was relied upon below and the construction in *L'Aiglon v. Lana Lobell, Inc., supra,* was before this Court when certiorari was refused in 1970. No reason is

suggested by the present petition why this Court shou'd reconsider, in effect, in the premises of the instant case, the denial of certiorari in *Bernard Foods Industries, Inc.* v. *Dietene Co., supra.*

In *Norman M. Morris Corp.* v. *Weinstein, supra,* it was found that defendant misrepresented Omega watches sold by him as guaranteed by Omega Watch Company, whereas the serial numbers essential to the existence of such guarantee had been removed by defendant from his watches. The Fifth Circuit further found that it was "perfectly clear, under evidence that was before the trial court which was free from dispute, that Weinstein gave false descriptions and made false representations *with respect to the watches he sold . . .*" 466 F.2d at 142 (emphasis added).

Petitioners' reliance upon *Chanel, Inc.* v. *Smith,* 178 U.S.P.Q. 630 (N.D. Cal. 1973), on remand from *Smith* v. *Chanel, Inc.,* 402 F.2d 562 (9th Cir. 1968), is misplaced.

In footnote 7 at page 13 of the petition, it is incorrectly stated that one of the misrepresentations by the defendant in that case, to the effect that it had taken defendant years to find the secret of duplicating the plaintiff's perfume known as "Chanel No. 5", was held to have violated Section 43(a). The misrepresentations in that case which were held to violate Section 43(a) were that the defendant had perfectly duplicated the exact scent of Chanel No. 5 and that this had been accomplished by a "masterful breakdown" of plaintiff's perfume and cologne (conclusions of law Nos. 11 and 12). The misrepresentation regarding the years of searching for the secret of duplicating Chanel No. 5 was contained in conclusion of law No. 13.

The last paragraph of the quotation from that decision set forth in petitioner's footnote 7, reads as follows:

> "With respect to *each* of such misrepresentations * * * defendant is in violation of California Civil Code § 3369 and in *violation* of 15 U.S.C. § 1125(a)." (Emphasis added)

In the space occupied by the three asterisks in the above quotation, the California District Court expressly limited the finding of violation of Section 43(a) to conclusions of law Nos. 10, 11 and 12 and did not hold Section 43(a) to be violated by the misrepresentation regarding the years of searching for the secret of duplicating Chanel No. 5.

Thus, *Chanel, Inc.* v. *Smith, supra,* as regards Section 43(a), was limited to the defendant's misrepresentation that the scent of its perfume was equivalent to that of plaintiff's perfume.

Thus, the Third Circuit in *L'Aiglon* v. *Lana Lobell, Inc., supra,* the Fifth Circuit in *Norman M. Morris Corp.* v. *Weinstein, supra,* the Seventh Circuit in *Bernard Foods Industries* v. *Dietene Co., supra,* and the First Circuit in *Samson Crane Co.* v. *Union National Sales, Inc.,* 180 F.2d 896 (1st Cir. 1950) *aff'g* 87 F. Supp. 218 (D Mass. 1949) each regarded an actual misrepresentation by defendant of a property of its goods to be essential to a finding of a violation of Section 43(a). The dictum of the Second Circuit in the case at bar merely follows the uniform interpretation of Section 43(a) by the other Circuits. There is no conflict to resolve.

Since reversal of the Second Circuit's unanimous factual determination that respondent's advertisements contain no misrepresentations is required in order for the application of Section 43(a) to be considered, and in view of the substantial harmony between prior circuit court interpretations of that section and that of the court below, we respectfully submit that no special and important reasons for review on writ of certiorari are presented by this record.

CONCLUSION

For the foregoing reasons we submit that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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